85-1810

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STUART GREEN AND LESLIE GREEN,
Appellants,

v.

DEPARTMENT OF HUMAN SERVICES OF THE STATE OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1) Whether West Virginia violated the constitutional prohibition against ex post facto laws and the equal protection and due process clauses of the United States Constitution by retroactive application of an amended child abuse statute to an ongoing judicial proceeding so that a child whose parents faced possible termination of their parental rights became an abused child under the new statute where she was not an abused child under the former statute in effect at the time the proceedings against the parents began.

2) Whether a record establishing a prima facie case of an attorney operating under a severe conflict of interest to the detriment of his parent clients in an involuntary parental rights termination proceeding, when presented to a State appellate court, requires the appellate court under the due process clause of the 14th Amendment to remand the case to the trial court for further fact finding prior to finalizing the involuntary parental termination.

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Notice of Appeal to the Supreme Court of the United States I1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

STUART GREEN AND LESLIE GREEN,

Appellants

V.

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA,

Appellee

On Appeal from the Supreme Court

Of Appeals of West Virginia

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia is set forth in the Appendix A. This order denied the appellants' appeal from the circuit court's order terminating their parental rights in and to their daughter, Tiffany Green.

The findings of fact and conclusions of law

of the Circuit Court of Jefferson County, West Virginia recorded on December 14, 1984, are set forth in the Appendix B. This order reflects the circuit court's decision to terminate the appellants' parental rights.

The findings of fact and conclusions of law of the Circuit Court of Jefferson County, West Virginia recorded on July 3, 1985, subsequent to a rehearing on a motion for modification of the December 14, 1984 judgment are set forth in Appendix C. The circuit court found a significant change in circumstances since December 14, 1984 but refused to modify the previous order terminating the appellants' parental rights. These findings of fact and conclusions of law are included because the Supreme Court of Appeals of West Virginia considered these subsequent findings of fact and conclusion of law prior to refusing the appellants' petition to appeal the December 14, 1984 judgment.

JURISDICTION

Jurisdiction of this Court is invoked pursuant

to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of West Virginia's Child Abuse Statute, W. Va. Code §§49-1-3 et. seq. (Supp. 1985) as applied to the facts of this case by the Supreme Court of Appeals of West Virginia, on the ground that, as applied, it is an ex post facto law repugnant to the Constitution of the United States, art. I, §10, cl. 1.

The order of the Supreme Court of Appeals of West Virginia involuntarily and permanently terminated the natural parental rights of Appellants to their daughter Tiffany Green and was entered on November 7, 1985. A notice of appeal to this Court was filed in the Supreme Court of Appeals of West Virginia and in the Circuit Court of Jefferson County, West Virginia on January 27, 1986. See Appendix I.

In the event the Court does not consider appeal the proper mode of review, Appellants request the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of

ceriorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post fact Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. CONST. art. I, §10, cl. 1

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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QUESTIONS PRESENTED

1) Whether West Virginia violated the constitutional prohibition against ex post facto laws and the equal protection and due process clauses of the United States Constitution by significantly amending its child abuse statute to turn an unabused child into an abused child by statutory definition and then retroactively applying that statute to a proceeding commenced before the amendment to the material prejudice of parents who relied

upon the previous statute in the initial stages of proceedings which resulted in the permanent termination of their parental rights.

2) Whether a record establishing a prima facie case of an attorney operating under a severe conflict of interest to the detriment of his parent clients in an involuntary parental rights termination proceeding, when presented to a State appellate court, requires the appellate court under the due process clause of the 14th Amendment to remand the case to the trial court for further fact finding prior to finalizing the involuntary parental termination.

RAISING THE FEDERAL QUESTIONS

At the earliest stages of the proceedings below, the appellant raised the claims upon which relief is being sought in this Court. As the Supreme Court of Appeals of West Virginia refused the appeal, timely filed therein, and entered its order on November 7, 1985, this matter is appropriately brought to this court by Appeal. Lawrence v. State Tax

Comm'n, 286 U.S. 276, 282 (1932) and e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-90 (1921). In the event the Court does not consider appeal the proper mode of review for any portion of the following, appellant requests that portion be regarded and acted upon as a petition for ceriorari pursuant to U. S. C. §1257(3).

STATEMENT OF CASE

Stuart and Leslie Green lived with their two children, Joseph and Tiffany, in a communal residence owned by John and Dorothy McClellan, located in Jefferson County, West Virginia, and known as "Stonegate". Approximately fifty persons resided there over the many years in a cult, the tenents of which included intense religious indoctrination and absolute obedience. Failure to obey constituted a basis for infliction of protracted punishment and even protracted corporal punishment for children

of tender years.

On October 5, 1982, Joseph Green, the appellants' son, died of shock resulting from blood collecting in his buttocks after he was paddled for disciplinary reasons for between one and one half and two hours by his father. The punishment, within the context of Stonegate, was unusual in result not duration. The Greens' other minor child, Tiffany, remained uninjured but was immediately placed in the custody of the West Virginia Department of Human Services. In criminal proceedings not involved with this appeal, the parents were convicted of involuntary manslaughter, were sentenced, and were incarcerated.

In October and November of 1982, Stuart and Leslie Green were evaluated by Dr. Bradley Soule, a psychiatrist, whose report indicated that Stuart Green was operating under intense religious beliefs. The doctor's report was immediately forwarded to counsel retained by Dorothy McClellen to represent the Greens in involuntary parental

termination proceedings regarding Tiffany Green. Counsel withheld the report from the circuit court and the Department of Human Services for over six months in direct contravention of a court order requiring the immediate filing and service of all such reports. In the child abuse proceeding counsel opposed the State's attempt to establish the existence of a religious cult at Stonegate and advised the Greens to pursue courses which could not help but lead to confrontations with the State Department of Human Services. The effect of these tactics was that the Greens appeared unwilling to cooperate with the State.

Dorothy McClellan, who retained said counsel without consulting with the Greens, was charged criminally for the death of Joey Green. One aspect of the case against her concerned establishment of the cult. According to sworn testimony of the appellants, and others, counsel had frequent contact with Dorothy McClellan during the pendency of the termination proceedings, although he did not

represent her on her criminal charges. Evidence obtained from the termination proceeding was, by statute, shielded from use against the natural parents in criminal proceedings.

The Greens' counsel did, however, expressly point to statutory deficiencies of the West Virginia child abuse statute in force at that time which precluded a finding that Tiffany was abused. A finding of abuse was a necessary prerequisite to the involuntary termination of parental rights. There was no evidence of abuse as to Tiffany. The case was postponed.

Public indignation in regard to the incidents at Stonegate and the difficulties attendant to termination of appellants' parental rights, prompted the State legislature to perform a wholesale restructuring of the statute. Under the new statute resulting from this publicity inspired legislative activity, no evidence as to actual abuse of a specific child needed to be found if another child in the home was abused. Children similarly situated to

Tiffany became abused children by statutory definition. The proceeding was resumed on October 10, 1984. The circuit court retroactively applied the new statute over appellants' objection and at the same time rejected any possibility that Tiffany was an abused child under the former statute. Thereafter, in contravention of long and well established State precedent founded on express allegiance to the Fourteenth Amendment to the United States Constitution, the court placed the burden of persuasion on the natural parents to overcome the taint associated with the death of Joey Green. See e.g. In Re Willis, 207 S.E. 2nd 129, 138 (W. Va. 1973). At the same time the lower court permitted the State to satisfy its burden that the parents were unfit to raise their child by almost exclusive reference to events associated with facts existant some two years earlier.

> "[B]ased on the fact that the [Circuit Court of Jefferson County] is of the opinion that there is no reasonble likelihood that

> the condition of abuse leading to the death of Joey Green can be substantially corrected in the near future pursuant to West Virginia Code Section 49-6-5 as the rehabilitation efforts were begun only after the criminal process as to both parents was at an end and the handwriting was on the wall, it is ADJUDGED AND ORDERED that the child Tiffany Green is not to be returned to her parents, and that all parental rights [are] terminated . . . ."

Appendix B10.

The appeal to the West Virginia Supreme Court was mounted by present counsel on May 15, 1985. West Virginia law does not give effect to involuntary parental termination until all appeals are exhausted.

At request of counsel, the West Virginia Supreme Court of Appeals postponed argument until after the case was reheard on a motion for modification of the termination order. Even though pre-

senting a much more accurate picture of the appellants' rehabilitative progress, to the extent that Tiffany's Guardian ad litem recommended reunification of the family, the appellants were unable to overcome the burden placed on them at the reconsideration hearing. The evidentiary burden placed on the appellants required them to show that the return of the child was in the child's best interest. While the West Virginia Supreme Court reviewed the record of that later hearing it did not grant leave to file exceptions thereto as part of that State appeal.

THE QUESTIONS ARE SUBSTANTIAL

1) Although acknowledging the modern trend to reserve ex-post facto analysis for criminal/penal statutes, the appellants argue an analogy between the sanction of involuntary parental rights termination and criminal/penal sanctions. Both involve the invasion and destruction of fundamental liberty interests. See Santosky v. Kramer, 455 U.S. 745, 753 (1982). This in and of itself is sufficient to

highlight the substantial nature of the federal question associated with the retroactive application of the West Virginia statute. W. VA. CODE §§ 49-1-3; 49-6-5 (Supp. 1985). The circumstances of this case present alternatives to fully equating the child abuse statute to a criminal/penal statute that would still demonstrate the child abuse statute is in direct contravention of the ex-post facto prohibition. U.S. Const., art. I, §10, cl. 1.

Revered authority discloses the real evil sought to be avoided by the ex post facto prohibition is the very evil so particularly present in this case. "[O]he legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceeding . . . ." THE FEDERALIST No. 44 (Madison) 282-83 (Rossiter ed. 1961). The "people of America . . . have seen with regret and indignation that sudden changes and legislative interference, in cases affecting personal rights, become jobs in the hands of the enterprising

and influential speculators . . . ." Id. See also Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Here that evil is manifestly represented in the parental termination proceeding initiated against appellants in 1982. It was a proceeding doomed to fail because Tiffany Green was not abused within the definitions created by the statute in effect at that time. The proceeding was postponed by the State prosecutor for two years, until legislation, in reaction to public indignation at "Stonegate", had been enacted. According to the trial court such legislative enactment was necessary under the circumstances because the previous statute had not defined Tiffany as abused due to her lack of injury. W. Va. Code §49-1-3 (1980) Appendix D.

The real terror in this case was the legislative interference with an ongoing proceeding when it became apparent the State had no case. The Constitution does not allow the States' that type of advantage in actions threatening the fundamental

liberty interests of its citizens. Perhaps a different rule might apply if the legislation did not benefit the State or even if a State were to initiate process after such legislation had been enacted. But this case represents the most egregious form of legislative interference. Evidentiary rules and burdens were changed in midstream. A defense to the proceeding was stripped away after being revealed by the appellants' counsel. Arguments that the public "interest" is served by such legislation, because it promotes the protection children beg the issue. The issue is legislative interference with an ongoing proceeding. This is a substantial Federal question. "No man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today . . . ." THE FEDERALIST No. 78 (Hamilton) 470 (Rossiter ed. 1961). If legislative interference with ongoing proceedings involving fundamental liberty interests is allowed, no family is safe whose destruction is politically expedient.

In addition, the revised definitions of "abused child" deny equal protection as guaranteed by the Fourteenth Amendment of the Constitution of the United States. An uninjured child is defined as abused if another child in the home is abused. W. Va. Code § 49-1-3(a)(l) (Supp. 1985). Concededly such a definition may be necessary to facilitate the immediate and short term protection of children in imminent danger of abuse. However, even if the absolutely unrestrained prospective reach of the definition is ignored because of an "important" governmental purpose, such a purpose is absent in this case. The statute was actually employed in 1984 to create a threat to an uninjured child two years prior to the effective date of the legislation. Unless "imminent danger" is given a whole new meaning, the unescapable sole purpose of retroactive application of this statute in this case was that this definition gave the State the leverage it needed to terminate the appellants' parental rights.

The retroactive application of this statute bears no conceivable rational relationship to a child who has been in State custody for some two years. It does not withstand the higher scrutiny with which statutes effecting parental rights are reviewed.

In regard to due process, the West Virginia revised child welfare statute creates two new presumptions applicable to termination proceedings which, in conjunction with one or perhaps two previously existing provisions permit a relatively early and effortless satisfaction of the State's evidentiary burden in parental termination proceedings. The first is an irrebuttable definition. An uninjured child is defined as abused if another child in the home is abused. W. Va. Code § 49-1-3(a)(l) (Supp. 1985). See also Manley v. Georgia, 279 U.S. 1, (1928) (due process violation). The second presumption appears in the form of a burden of persuasion placed on the parents to demonstrate that the conditions of abuse can be corrected.

Compare W. Va. Code § 49-6-5-(b) (1980) with W. Va. Code § 49-6-5(b) (Supp. 1985). A case of serious abuse, such as resulted in the death of Joey Green, makes this second burden virtually insurmountable. Acknowledging the parents' rehabilitative efforts, the trial court stated "the past always speaks stronger than the future" and denied the parents' motion for modification. Appendix C15.

There are two additional provisions found in both the earlier and more recent versions of the West Virginia child abuse statute which, individually and in combination, also serve to shift the evidentiary burden from the State to the parents. The "present situation of the child" is to be considered by the trial court in determining what disposition would be appropriate for the child after a finding of abuse has been made. See W. Va. Code § 49-6-5(a) (1980) and W. Va. Code § 49-6-5(a) (Supp. 1985). It is within this context of the "present situation of the child" that the

trial court is to determine disposition of the child, guided by the polar star of the child's best interest. In cases such as Tiffany Green's, the psychological bonding which by time alone is formed between the State appointed temporary care-takers and the child, creates a hurdle the parents are forced to overcome in order to gain the reunification of the family. The evidentiary burden of this hurdle is even heavier when parents seek modification of a previously imposed dispositional order under W. Va. Code § 49-6-6 (1980). This increased burden was demonstrated by the trial court's opinion at the conclusion of the hearing on the appellants' motion for modification. The trial court rejected the State's contention that the appellants be required to demonstrate reunification of the family would "materially benefit" the child. See Holstein v. Holstein, 160 S.E. 2d 177 (W. Va. 1968). The trial court applied a somewhat lighter burden to the appellants. However, the burden of persuasion was nonetheless placed upon the parents.

The collective efforts of these presumptions and burdens of persuasion is to shift the evidentiary burden from the State to the parents. This shift renders the statute unconstitutional. Santosky v. Kramer, 455 U.S. 745 (1982). See also Speiser v. Randall, 357 U.S. 513, 524-25 (1958).

The effect of this burden upon the appellants under W. Va. Code § 49-6-6 (1980), can best be demonstrated by the fact that the opinion of Tiffany Green's guardian ad litem, that the appellants had been rehabilitated and that Tiffany should be reunited with her family, carried insufficient force to defeat the burden placed upon the parents under the statute.

That the retroactively applied statute was enacted to deal with the "Stonegate" problem and the resulting public outrage at this religious cult is demonstrated in the record. As understandable as such a reaction is, it cannot be allowed, through political and legislative actions, to impact upon a legal proceeding commenced prior to its formula-

tion. Quick to express moral indignation at the horrors perpetrated by others in the name of righteousness, we should best restrain responsive action within constitutional perimeters, lest our own indignation and self-righteousness overtake us and create in us a variety of that which we condemn.

2) The Supreme Court of Appeals of West Virginia reviewed a record of sworn testimony proffered to demonstrate that the appellants' initial trial counsel had operated under a direct and powerful conflict of interest during his representation of the appellants. After reviewing that record, the Supreme Court of Appeals of West Virginia denied the requested appeal without remanding the case back to the trial court for a determination of whether the appellants had been provided with adequate assistance of counsel as required by West Virginia statute and by West Virginia case law. See State ex rel. LeMaster v. Oakley, 203 S.E. 2d 140, 144-45 (W.Va. 1974). The impact of the advice and assistance of legal counsel on parents

facing possible termination of their parental rights is immeasurable. In this case counsel advised a course of conflict rather than cooperation which was noted by the initial court when the appellants' parental rights were terminated. Of more universal impact, however, is the question of whether a state appellate court is under a duty to remand a case to the trial court when the record before it indicates a conflict of interest on the part of trial counsel. When the appellate court is reviewing a trial court action involving the destruction of fundamental liberty interests, the appellants would argue that the due process and equal protection clauses require such a remand. See Wood v. Georgia, 450 U.S. 261 (1981). The issues associated with this question are important and are applicable to every appellate court reviewing parental termination proceedings.

CONCLUSION

For the aforegoing reasons, summary reversal should be granted, or in the alternative, probable

jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 7th day of November, 1985, the following order was made and entered, to-wit:

Department of Human Services of the State of West Virginia

vs.

Tiffany Green, Infant, etc., et al.

On a former day, to-wit, May 15, 1985, came the petitioners, Stuart Green and Leslie Green, by Richard C. B. Woods, their attorney, and presented to the Court their petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Jefferson County rendered on the 14th day of December, 1984, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ George W.

A2

Singleton

Clerk Supreme Court of

Appeals

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

WEST VIRGINIA

SITTING AS A JUVENILE COURT

DEPARTMENT OF HUMAN SERVICES

vs. Petition No. 82-J-74

TIFFANY GREEN, Infant,

LESLIE GREEN, Mother,

STUART GREEN, Father,

Defendants

O R D E R

This matter came on for hearing this 2nd day of October, 1984, upon the papers and pleadings formerly read and had herein; upon the preliminary hearing commenced on the 13th day of October, 1982, at the conclusion of which said hearing the Petitioner did rest its case; upon the subsequent orders entered herein continuing the matter over; upon the calling of the matter on for hearing this day and date; upon the appearance of the Petitioner Joseph Corbin, Jr., in person and by counsel Braun

A. Hamstead, Prosecuring Attorney of Jefferson County, West Virginia; upon the appearance of the Respondent parents in person and by counsel, John C. Skinner, Jr., and upon the appearance of the child in person and by her guardian ad litem, James Crawford; upon the appearance of the divers witnesses in the case.

WHEREUPON the Petition proceeded to call its witnesses, and did place into evidence certain exhibits marked as "Petitioner's Exhibits NO. 1, 2 & 3," to which exhibits the Defendant parents did not object or except.

During the cross-examination of witness for the Petitioner, Dr. Guy Brooks, counsel for the Defendant parents did mark and place into evidence Respondents' Exhibit No. 1, to which the Petitioner did not object or except, and upon the taking of further testimony for the Petitioner, the Court did conclude that a recess was necessary for a period of one hour, and, after a period of that one hour, testimony did resume, at the conclusion

of which the Petitioners did rest their case at this final hearing.

WHEREUPON Counsel for the Defendant parents did make a Motion for Judgement on behalf of the Respondent parents, which said Motion was denied by the Court, and the Respondents did then present evidence by divers witnesses, at the conclusion of which testimony the Respondent parents did rest.

WHEREUPON the Petitioner did present testimony in rebuttal to the testimony offered by the Respondent parents, at the conclusion of which the Petitioners did rest their case in rebuttal.

After hearing the closing arguments of counsel, and in consideration of all evidence presented, the Court does make the following findings of fact:

That all findings of fact made the Court at prior hearings and included in that Order dated July 18, 1984, are hereby incorporated into this Order for all pertinent purposes:

That the testimony of Marcie Kemner, agent for the Department of Human Services, sets forth the fact that at no time during her involvement in the case, a period of some one and one-half years, did the Respondent parents cooperate with her in any way, nor did they express to her any indications of remorse whatsoever;

That the testimony of Dr. Guy Brooks was to the effect that the parent Leslie Green did not cooperate with his testing under an Order of a Circuit Court of West Virginia in a related child abuse and neglect proceeding involving the other sibling of the deceased child, Joseph Marshall Green, so that the sibling could be psychologically tested and evaluated by him in accord with that said Court Order;

That the report of the evaluation made by one Dr. Bradley Soule (at the request of Counsel for the Respondent parents) indicates that the parent Stuart Green was operating under an intense religious belief and felt that the death of the child

was attributale to "God's will;" and further that Dr. Soule expressed reservations about returning the child to her parents.

That Dr. Trevor Stokes, Associate Professor of Psychology at West Virginia University, interviewed the child Tiffany Green and the foster parents, Mr. & Mrs. Glen Niceley, but did not interview the Respondent parents; that in response to a hypothetical question posed by the attorney for the Petitioners incorporating the facts of this case as to whether or not there would be a risk in returning the child to the custody of the parents, the witness responded that there would be a high risk;

That the testimony of Joseph Corbin, Agent of the West Virginia Department of Human Services, established that he was the first Department agent to make contact with the group known as "Stonegate;" that there had been an arrangement between the Department and the Respondent parents regarding certain actions by the parents to reassure

the Department that the parents were making efforts to change their style of interaction with their remaining children; that this arrangement was reduced to writing, and required: (1) a. that the parents would receive psychological counseling and/or therapy, and that the Department would have access to the therapist and to all reports; (1) b. that a local psychologist or psychiatrist was to be utilzied, if at all possible; (2) that the parents attend educational sessions that would teach them parenting skills and the recognition and observation of a child's development process; (3) that the recommendation of the Department depended on when a point in time was reached that the Department felt the children would be safe; (4) the parents would continue to cooperate with the Department through its agents and workers; Mr. Corbin further testified that the parents had fulfilled the requests made of them by the Department:

That Dr. Hiram Sizemore was produced as

a witness on behalf of the parents. He testified that he did not examine the parents until the Fall of 1983; that he had not seen Mrs. Green for the past two or three months due to adventitious circumstances but Mr. Green has been seeing Dr. Sizemore in Shepherdstown although living in Baltimore, Maryland; it was Dr. Sizemore's professional opinion that the Court could with safety return Tiffany to her parents upon certain conditions as follows:

(1) Both parents to continue psychiatric treatment for one to two years;

(2) The children be examined every three months by a physician for evidence of abuse;

(3) The Department of Human Services should continue to supervise the Respondent parents.

Further his examination of both parents could find no mental diseases nor disabilities although they have been suffering from some adjustment disorder which he concluded would be temporary.

That Charles Kirby, witness for the Respondent parents, a child psychologist at Eastern Panhandle

Mental Health Center, conducted the parenting classes for the Respondent parents, at which classes, in his opinion, the Respondent parents made progress; that he did not see any reason why Tiffany Green should not be returned to her parents;

That Dr. Mildred Williams, a general family physician and witness for the Respondent parents, had treated the children of the Respondent parents and the parents prior to the death of Jopseh Marshall Green; that, as far as she could see, there was no reason why the child should not be returned to the parents;

That Glen and Mary Nicely, foster parents of Tiffany Green, with whom the Department had placed Tiffany, were presented to the Court; but the only issue for the Court is whether or not custody should be removed from the parents and vested in the Department.

That the Respondent parents, Leslie and Stuart Green, testified that they realized that they had made a mistake, that they had received benefit

from the parenting classes, and that they would not discipline in that manner in the future; the father Stuart further testified that he was living in Baltimore, Maryland, with his mother. That he is employed as a waiter and that the Greens' other child Julie resides with him in Baltimore and that when Leslie Green is released from jail it is the intention of the Greens to reside in Baltimore with their children.

After hearing all evidence and arguments of counsel, the Court doth make the following conclusions of law:

That the welfare of the child is the polar star which must guide this Court;

That on October 5, 1982, the West Virginia statute made no provisions for the removal of a sibling from the home of an abused child. That the specific authority to remove a sibling was not enacted into the statute until the 1984 sessions, March 10, 1984, effective ninety (90) days from passage.

Accordingly, based on all the evidence presented before it, and based on the fact that the Court is of the opinion that there is no reasonable likelihood that the conditions of abuse leading to the death of Joey Green can be substantially corrected in the near future pursuant to West Virginia Code Section 49-6-5, as the rehabilitation efforts were begun only after the criminal process as to both parents was at an end and the handwriting was on the wall, it is

ADJUDGED and ORDERED that the child Tiffany Green is not to be returned to her parents, and that all parental rights and responsibilities of Stuart and Leslie Green to the child Tiffany Green are hereby terminated, with custody, care and control to be awarded the Department of Human Services with the power to consent to adoption and with further powers to obtain and provide the needed medical and dental attention, to all of which the Respondent parents object and except.

At this time, Counsel for the Respondent

parents did move the Court grant an improvement period, which Motion the Court does overrule, for reasons already upon the record.

WHEREUPON the Court inquired as to all parties present if there was anything further, and Counsel for the Respondent parents indicated that they wished to be furnished with a free transcript of the proceedings in order to appeal the decision of the Court, and, it appearing that the Respondent parents have executed the requisite affidavit of indigency at a prior date, it is

ADJUDGED and ORDERED that the Court Reporter do prepare a transcript free of charge at the earliest convenience of the Reporter.

The Court did then inquire of the guardian ad litem as to whether or not he had any objection to the ruling of the Court, and he indicated that he did not wish to object and except to the ruling contained in this Order.

There being nothing further to consider, the Court did declare the hearing at an end.

This Order was presented to me on December 11, 1984.

/s/ Vance E. Sencindiver

JUDGE

Received and Filed in the
Office of the Clerk of the
Circuit Court of Jefferson
County, WV on 12/14/84
/s/ P.R. Spates
Assistant Deputy Clerk

APENDIX C

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA

vs. JUVENILE

TIFFANY GREEN, Infant PETITION

LESLIE GREEN, Mother No. 82-J-74

STUART GREEN, Father

Portion of proceedings had and testimony taken before the Honorable Patrick G. Henry, III, Judge, on July 3, 1985.

COURT:

All right, thank you. Now I think counsel will agree that in effect if I were an appellate court, this would be a case of first impression. There is virtually no law in this state of any assistance. There are no guidelines, no standards.

According to our statute, there's not even any discretion as to whether or not the Court holds a hearing. It is mandatory. Even to the extent that in the event of a determination of parental rights and let's say the passage of ten years and

the child has been in a prospective adoptive home but for some reason they've never gone through with it, the natural parents would be permitted even with a ten year attachment to prospective parents, to come back into court under an alleged change of circumstances and reopen the entire matter.

We're thankfully in this case not dealing with the passage of ten years time. Effectively we're dealing most concisely with the passage of time from October of 1984 through this date. Which is one of the few things I can be thankful for that we're not going through ten years worth of time, rather we're going through, in effect, directly less than a year and collaterally going back approximately essentially three to four years.

The Court is further concerned about the absence of the pychological profile conducted on Tiffany which was apparently conducted in the summer of 1984. It does not appear of record unless it is with the exhibits that were transmitted to

the State Supreme Court of Appeals. And without knowing what the results were of that evaluation, the Court feels that there is a link missing which could have been of assistance to the Court in placing other expert testimony in its proper perspective.

The statute with which we're concerned deals with a substantial change of circumstances which may justify a change of custody. As I've stated before, by virtue of the polar star concern of the Court for the welfare of the child, somewhere in that statute is the inherent consideration of the child's welfare and that a mere substantial change of circumstances is not sufficient upon which to justify modification. The interests of the child separate and apart from consideration of changes must be considered by the Court in rendering of its decision.

Now whether that standard should be the standard of (Holstein) where the change must be shown to materially promote or whether because we're dealing with the intervention by the state, the

standard to be shown by the Petitioners is less. This Court is without assistance by our state Supreme Court and I will muddle through it the best I can under the circumstances.

I will note for the benefit of counsel that in reviewing the prior proceedings we have some contradictions between the evidence adduced today and prior evidence. Specifically the hearing in October of '84 the testimony of Bradley Soule on Page 50 of the transcript in his evaluation of the Greens of October and November of 1982 found in using the garbage word, no brainwashing. Which is in contradiction to the testimony of Dr. Goldstein who found clear evidence of a cult atmosphere and cult influences on the Greens.

Additionally, Dr. S-T-O-C-K-E-S, I don't know whether its Stoakes or Stockes on Page 58 of the transcript who evaluated Tiffany and except for the actual knowledge to the contrary believed that the relationship between Tiffany and the Nicelys was that of a natural parent and child. That

tends to contradict the testimony of Dr. Rosenberg.

And in considering the evidence at the proceedings for these two cases and the Court must at least note those contradictions in order to place all the evidence in its proper perspective.

Through the testimony of Stuart Green we heard considerable evidence regarding the cult atmosphere of the Stonegate community. And the uniform system of child discipline which progressively became more severe after 1981 and which for the purposes of this proceeding, culminated on October 5, 1982, when he overheard Leslie disciplining his son, Joey, assumed the duties of disciplinarian, and entered into a beating of Joey for a period of two hours which resulted in his death due to hemorrhaging.

There was also considerable testimony as to the events in changes in his life since October of 1984. That he has in effect left the commune atmosphere, that he's residing with his mother and stepfather in Baltimore, that he's undergoing

counseling for which the prognosis is good to excellent and is ongoing.

Dr. Goldstein in his evaluation of the information available to him felt that it was quite clearly a cultist atmosphere, that the Greens were subjected to the whims of Dorothy McClellan to the extent as he characterized it, that dogma took precedence over all human experience. And therefore what happened to Joey Green was not true child abuse in the sense that we commonly think of it.

That is very convenient, psychologically. Unfortunately our statutes in this court are concerned with the result and not the motivation for the damages or injuries that are inflicted on the child. And while motivation or good intentions may act in mitigation, we are still dealing with the death of a child and still dealing with a basic failure of human compassion through the death of Joey, and the death and the severe beatings of other children for protracted periods of time.

And while it is clinically a matter which a

psychologist can deal with, it is a different matter for those who have to deal with the legal culpability and the realities of life.

It is interesting to note that the apparent justification for Dorothy McClellan's dogma was religious in nature and going back as far as Abraham and his son and coming through the Crusades and Spanish Inquisition, it is unfortunately absurdly true that religion is responsible for countless atrocities committed in the name of saving mankind or an individual and this is a matter that the state has always had problems dealing with in the United States because of delineation between church and state. It makes it that much harder to understand how this could have happened in the name of religion. And that much more difficult for the state to justify intervention.

Subject to the contradictions I raised previously, Dr. Rosenberg testified as to the good parent-child relationship existing between the Greens and Tiffany. Based upon his evaluation conducted yesterday

and his opportunity to observe the child in an atmosphere where he could compare the parents and the foster parents. That's also contradicted by the testimony of Jan Adams. Of course, there we get back to the old problem of the lesser qualified expert who has greater contact versus the greater qualified expert who has lesser contact and to what extent courts are willing to recognize the ability of an average individual to correctly identify human nature or to make observations regarding human behavior.

Jan Adams had concern for the present bonding between Tiffany and the Nicelys and was concerned that the passage of three years would result in upheaval to Tiffany if she's removed from the Nicelys at this time. She further indicated that she is not yet satisfied with the progress of the Greens.

The Court then heard the testimony of Ed and Jenny Schlosser, Lawrence Crum, Semore Sandick. Admittedly all relatives of the Greens, but

all in a position to observe changes in behavior and changes in attitude. And although taken with a grain of salt, the Court has no problems in acknowledging that the Greens have undertaken a radical effort to change their lifestyle and through counseling to get back to a normal life.

There is also strong indication of good family support both financially and emotionally and a unification of family efforts towards the uniting of this family. The very strong consideration on behalf of the Greens.

As I've raised to cousel before, I have problems with regard to the status of Julie and allowing that to carry great weight on the plus side for the benefit of the Greens, I acknowledge that there have been no indications presented to the Court of any problems arising with respect to the care and parenting by the Greens to Julie while they've remained in the same household.

This in consideration of the fact that the grandparents have deferred most parenting duties

on behalf of the Greens would show that the Greens are exhibiting a strong sense of active parenting and presumably within the normal acceptable range.

We run then into the testimony of Mrs. Nicely. And though perhaps there may have been matters raised on cross examination which were not as a result of the Greens affection for her, she denoted no change in effect over the past years from 1982 to the present with respect to the Greens conduct, behavior, attitudes. I must also take her testimony with a grain of salt as a result of the obvious emotional bond which she has with Tiffany and while I'm not going to find or allude to a direct intent to mislead the Court, she has a vested interest in not being observant to say the very least.

Through the testimony of Leslie Green I finally found someone from Stonegate who actually acknowledged that they were uncomfortable with the beatings. And at least with respect to her own son being beaten, had to withdraw. I agree with one proposition tendered by Mrs. Green and that

is in effect, if you are not under the influence of the cult, you cannot understand how this could happen. And I don't think that the rest of the world can understand how a parent could stand by and beat a child for two hours doing it in the name of God or to watch another child being beaten for four hours and not intervene.

It is almost akin to Nazi Germany where the blind following of orders was the justification for all inhumanity and was expected to be the exoneration of all culpability. It is incomprehensible to the average person how anyone regardless of the amount of indoctrination can allow this to happen.

Now it may be understandable to the psychologists. But to a parent, I agree with her that I cannot understand it.

We're dealing through the Greens with two individuals who have to date never lived on their own either as a married couple and their relationship with each other or as parents with the sole responsibility of their children. They first lived in their

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respective homes, then at Stonegate, for a period of time each was in jail, and now they're residing with his parents in Baltimore.

There's constantly been that umbrella of protection for what appears to be almost the last 15 years. There's also the consideration that although the prognosis is good with respect to their psychological development, Dr. Goldstein represents that Stuart is detached from the cult and Leslie is less so. And acknowledges that each requires additional therapy.

When questioned by the Court, he acknowledged that there's always the possibility of anxiety. And we have in any normal human relationship with another person or persons a stress created each time there is a change of circumstances.

Psychologists like to have a chart whereby you go down and check off certain things that have happened in your recent past and account a point value to each event. And if you reach a certain total that you should consider counseling.

Events such as a loss of a job or a divorce or change or residence. I have great concern at this point that the Greens are not making it on their own and while I join Mr. Crawford in commending them for breaking from the past and working to the future, I am simply not satisfied that the circumstances to which Tiffany would be returned on this date would be in the best interests of the child in considering the present level of psychological advancement of the parents and of the continued dependency of the Greens on external assistance in order to manage their lives.

The Court considers implicit as a conclusion of law that it must find that the proposed change is in the best interests of the child which I cannot do at this point in time. I do not agree that the (Holstein) standard should attach to the Greens. I don't think the burden is that high upon them to show that it would materially benefit the child. But to uproot the child from what has been a reasonably stable environment for the past three years,

and lodge the child in a home which is now replete with counseling and an impending move from one residence to another, and within some foreseeable time a relocation of the Greens from out of the household of his parents, the Court must consider those future disruptive events in determining that the present status of the child appears to be stable, appears to be beneficial to the welfare of the child, and the Court cannot conclude that the statutory mandates have been met sufficient to justify modification of the prior order of the Court.

Accordingly it is adjudged and ordered that the Petition for Modification be and the same is hereby denied. Counsel, you may show your objection to the Court's ruling.

MR. WOODS:

Thank you, your Honor. I would except and object to the Court's ruling.

Your Honor, this proceeding also would allow the Court to grant a post-dispositional improvement period and I will assume for the sake of this hearing

that such a motion is also at this time denied?

COURT:

It is denied. Once parental rights have been terminated under those circumstances, you can't have an improvement period. Now it may well be that by the time the Supreme Court has had a chance to hear this matter, I may be on my way being referred to as learned counsel which is generally reserved for Judges who get reversed, and that it may be remanded for further hearing. And that by that point in time the progress of your clients may be satisfactory to justify a change.

And I don't want to stop their efforts. I am in a position of weighing the welfare in this proceeding. I am concerned only about Tiffany. Based on past actions and future projections, and unfortunately the past always speaks stronger than the future, and I'm not willing to risk the life of a child unless I'm satisfied.

Now the Court Reporter is directed to insofar as she's humanly possible to do, to give priority

to the preparation of this transcript and the Court hereby directs that a copy of the transcript be made available to counsel for submission and incorporation into his present appeal before the West Virginia State Supreme Court of Appeals.

MR. WOODS:

For the record, also, your Honor, I would like to extend the grateful appreciation of Stuart and Leslie Green and myself as counsel for the tremendous effort that the Court has made to allow this proceeding to continue until its termination and I know we've really -- you've bent over backwards. And we appreciate that and I want to thank you on the record.

Oh, and I would also note, of course, my exception and objection to your denial for the motion -- for an improvement period.

COURT:

This hearing is adjourned.

APPENDIX D

W. VA. CODE § 49-1-3 (1980).

"Abused child" means a child:

Whose parent, guardian or custodian inflicts or attempts to inflict or allows to be inflicted as a result of inadequate supervision, physical injury or substantial emotional injury upon the child which endangers the present physical or mental health of such child or inflicts, attempts to inflict or knowingly allows to be inflicted sexual abuse upon the child.

"Neglected child" means a child:

(1) Whose physical or mental condition is impaired or endangered as a result of the present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education and the condition is not due primarily to the lack of financial means of the parent, guardian or custodian; or

(2) Who is presently without necessary food,

clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

"Neglected child" does not mean a child:

(1) Whose parent, guardian or custodian has failed to provide him with medical care because such medical care conflicts with the tenets and practices of a recognized or religious denomination or order of which such parent, guardian or custodian is an adherent or member; or

(2) Whose education is conducted within the provisions of section one [§ 18-8-1], article eight, chapter eighteen of this Code. (1936, 1st Ex.Sess. C. 1: 1941, c. 73: 1977, c. 65: 1978, c. 14.)

APPENDIX E

W. VA. CODE § 49-1-3 (Supp. 1985).

(a) "Abused child" means a child whose health or welfare is harmed or threatened by:

(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or substantial mental or emotional injury, upon the child or another child in the home; or

(2) Sexual abuse or sexual exploitation.

In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

(b) "Abusing parent" means a parent, guardian or other custodian, regardless of his or her age, whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to consititute child abuse or neglect.

(c) "Child abuse and neglect" or "child abuse or neglect" means physical injury, substantial mental or emotional injury, sexual abuse, sexual exploitation

or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child.

(d) "Child abuse and neglect services" means social services which are directed toward:

(1) Protecting and promoting the welfare of the children who are abused or neglected;

(2) Identifying, preventing and remedying conditions which cause child abuse and neglect;

(3) Preventing the unnecessary removal of children from their families by identifying family problems and assisting families in resolving problems which could lead to a removal of children and a breakup of the family;

(4) In cases where children have been removed from their families, providing services to the children and the families so as to restore such children to their families;

(5) Placing children in suitable adoptive homes

when restoring the children to their families is not possible or appropriate; and

(6) Assuring the adequate care of children away from their families when the children have been placed in the custody of the department or third parties.

(e) "Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health or life of any child in the home:

(1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or babysitter or other caretaker; or

(2) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome; or

(3) Nutritional deprivation; or

(4) Abandonment by the parent, guardian or custodian; or

(5) Inadequate treatment of serious illness or disease; or

(6) Substantial emotional injury inflicted by a parent, guardian or custodian.

(f) "Multidisciplinary team" means a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose and treat specific cases of child abuse and neglect. Multidisciplinary teams may include, but are not limited to, medical, child care and law-enforcement personnel, social workers, psychologists and psychiatrists. Their goal is to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children. "Community team" means a multidisciplinary group which addresses the general problem of child abuse

and neglect in a given community, and may consist of several multidisciplinary teams with different functions.

(g) (1) "Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due priminarly to lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

(2) "Neglected child" does not mean a child:

(A) Whose parent, guardian or custodian has failed to provide him with medical care because such medical care conflicts with the tenets and practices of a recognized religious denomination

or order of which such parent, guardian or custodian is an adherent or member; or

(B) Whose education is conducted within the provisions of section one, article eight, chapter eighteen of this code.

(h) "Parenting skills" means a parent's competencies in providing physical care, protection, supervision and psychological support appropriate to a child's age and state of development.

(i) "Sexual abuse" means:

(A) As to a child who is less than sixteen years of age, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse; or

(ii) Sexual intrusion; or

(iii) Sexual contact; or

(B) As to a child who is sixteen years of age of older, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse; or

(ii) Sexual intrusion; or

(iii) Sexual contact; or

(C) Any conduct whereby a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making such display, or of the child, or for the purpose of affronting

or alarming the child.

(j) "Sexual contact" means sexual contact as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(k) "Sexual exploitation" means an act whereby:

(1) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct as that term is defined in section one, article eight-c, chapter sixty-one of this code;

(2) A parent, guardian or custodian persuades, induces, entices or coercies a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or sex organs under circumstances in which the parent, guardian or custodian knows such display is likely to be observed by others who would be affronted or alarmed.

(l) "Sexual intercourse" means sexual intercourse as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(m) "Sexual intrusion" means sexual intrusion as that term is defined in section one, article eight-b, chapter sixty-one of this code.

APPENDIX F

W. VA. CODE §49-6-5 (Supp. 1985)

(a) Following a determination pursuant to section two of this article wherein the court finds a child to be abused or neglected, the court may request from the state department information about the history, physical and emotional condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall given precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the state department;

(4) Order terms of supervision calculated to assist the child and the abusing parent or parents which prescribe the manner of supervision and

care of the child and which are within the ability of the parent or custodian to perform;

(5) Upon a finding that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. If the court shall so find, then in fixing its dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to

be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final.

(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:

(1) The abusing parent or parents have habi-

tually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such abusing parent or parents have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or

(6) The abusing parent or parents have incurred emotional illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

(c) The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently

terminated and the court shall require the parent to rectify the conditions upon which the determination was based. No more than one such postdispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section.

APPENDIX G

W. VA. CODE § 49-6-5 (1980).

(a) Following a determination pursuant to section two [§ 49-6-2] of this article, the court may request from the state department information about the history, physical condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child and the child's parent or custodian to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his own home under supervision of the state department;

(4) Order terms of supervision calculated to assist the child and the child's parent or custodian which prescribe the manner of supervision and care of the child and which are within the

ability of the parent or custodian to perform;

(5) Upon a finding that the parents or custodians are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen yeras of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child

shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final.

(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that: (1) The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parenting ability has been seriously impaired and the parent has not responded to or followed through with recommended and appropriate treatment which could have improved the capacity for adequate parental functioning; (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan designed to lead to the child's return to the parent or parents; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative

agencies designed to reduce or prevent the neglect or abuse of the child, as evidenced by the continuation of substantial or repeated acts of neglect or abuse after the provision of such services; (4) the parent or parents have abandoned the child; or (5) the parent or parents have repeatedly or seriously physically abused the child.

(b) A child taken into protective custody as abandoned under the provisions of this section may be housed by the state department or in any authorized child shelter facility. The authority to hold such child in protective custody as abandoned, absent a petition and proper order granting temporary custody pursuant to section three [§ 49-6-3] of this article, shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (1) the expiration of ninety-six hours from the time the child is initially taken into protecive custody, or (2) the expiration of the circumstances which initially warranted the determination of abandonment.

No child may be considered abandoned and custody withheld from such child's parents, parent guardian or custodian presenting themselves, himself or herself in a fit and proper condition and requesting physical custody of such child. No child may be removed from a place of residence as abandoned under this section until after (1) all reasonable efforts to make inquiries and arrangements with neighbors, relatives and friends have been exhausted; or if no such arrangements can be made, (2) the state department may place in the residence a home services worker with the child for a period of not less than twelve hours to await the return of such child's parents, parent, guardian or custodian. Prior to taking a child into protecive custody as abandoned at a place at or near the residence of such child, the law-enforcement officer shall post a typed or legibly handwritten notice at the place the child is found, informing the parents, parent, guardian or custodian that the child was taken by a law-enforcement officer, the name,

address and office telephone number of the officer, the place and telephone number where information can continuously be obtained as to the child's whereabouts, and if known, the worker for the state department having responsibility for the child.

(c) A child taken into protective custody pursuant to the provisions of this section for emergency medical treatment may be held in a hospital under the care of a physican against the will of such child's parents, parent, guardian or custodian for a period not to exceed ninety-six hours. The parents, parent, guardian or custodian may not be denied the right to see or visit with such child in a hospital. The authority to retain a child in protective custody in a hospital as requiring emergency medical treatment shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (1) When the condition, in the opinion of the physican, no longer required emergency hospitalization, or (2) upon the expiration

of ninety-six hours from the initiation of custody, unless within such time, a petition is presented and a proper order obtained from the circuit court.

(d) Prior to assuming custody of a child from a law-enforcement officer, pursuant to the provisions of this section, a physician or worker from the state department shall require a typed or legibly handwritten statement from such officer identifying such officer's name, address and office telephone number and specifying all the facts upon which the decision to take the child into protective custody was based, and the date, time and place of the taking.

(e) Any worker for the state department assuming custody of a child pursuant to the provisions of this section shall immediately notify the parents, parent, guardian or custodian of the child of the taking of such custody and the reasons therefor, if the whereabouts of the parents, parent, guardian or custodian are known or can be discovered with due diligence; and if not, notice and explanation

shall be given to the child's closest relative, if his or her whereabouts are known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors, and if a relative or appropriate neighbor is willing to assume custody of the child, such child shall temporarily be placed in such custody.

(f) No child shall be taken into custody under circumstances not jusified by this section or pursuant to section three [§ 49-6-3] of this article without appropriate process. Any retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law.

(g) As sued in this section:

(1) "Abandoned" means to be without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child;

(2) A "law-enforcement officer" means a law-enforcement officer of the department of public safety, a municipality or county sheriff's department;

(3) A "condition requiring emergency medical treatment" means a condition which, if left untreated for a period of a few hours, may result in permanent physical damage; such a condition includes, but is not limited to, profuse or arterial bleeding, dislocation or fracture, unconsciouness and evidence of ingestion of significant amounts of poisonous substance. (1980, c. 25.)

APPENDIX H

W. VA. CODE § 49-6-6 (1980).

Upon motion of a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, that a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5] shall not be modified after the child has been adopted. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department. (1977, c. 65.)

APPENDIX I

IN THE SUPREME COURT OF APPEALS

OF THE STATE OF WEST VIRGINIA

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA

vs. PETITION FOR WRIT

TIFFANY GREEN, Infant OF ERROR AND

LESLIE GREEN, Mother SUPERSEADEAS

STUART GREEN, Father

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given by LESLIE GREEN, mother above-named, and STUART GREEN, father above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of the State of West Virginia, refusing an appeal, entered in this action on November 7, 1985.

This appeal is taken pursuant to 28 U.S.C. §1275(2).

/s/Richard C.B. Woods

Counsel for Appeallants

Leslie and Stuart Green

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 27th day of January, 1986, a copy of the aforegoing NOTICE OF APPEAL was mailed, via first class mail, postage prepaid, to Michael J. Cassell, Esquire, Assistant Prosecuting Attorney for Jefferson County, P.O. Box 729, Charles Town, West Virginia 25414, attorney for the Department of Human Services; James B. Crawford, III, Esquire, P.O. Box 711, Charles Town, West Virginia 25414, guardian ad litem for Tiffany Green, Infant; George W. Singleton, Clerk of the Supreme Court of Appeals of West Virginia Charleston, West Virginia 25305; and the Circuit Court for Jefferson County, West Virginia, Court House, Charles Town, West Virginia 25414.

/s/ Richard C.B. Woods

title thereof, *unless due to the fault or cause of the tenant,*[13] . . . shall be paid out of principal." Tex. Rev. Civ. Stat. Ann. art. 7425b-36 (Vernon 1960 & Supp. 1982-1983) (emphasis added).[14]

[24] Based upon this last-cited Texas statutory provision, the district court found that the Trustees' allocation of litigation expenses between the corpus and the income account was proper. We like the district court are unable to find any reason suggested by the record that the Trustees abused their trust-entrusted discretion by paying litigation expenses from the income (of which duPont III was trust beneficiary) rather than from the principal of the trust (of which duPont IV was the principal beneficiary). Under the cited Texas statute, litigation expenses could be charged to income rather than principal when resulting from "the fault or cause" of duPont III.

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13. The Texas Trust Act defines "tenant" as "the person to whom income is presently or currently payable." Tex. Rev. Civ. Stat. Ann. art. 7425b-4(H).

14. Although Art. 7425b was repealed in 1983 when the Texas Trust Code was enacted, *see supra* note 10, it applies to all transactions—including payments of litigation expenses—occurring prior to January 1, 1984. Texas Trust Code § 111.006 (Vernon 1984).

DuPont III argues that Art. 7425b-36 is inapplicable, since the Trust instrument itself specifies how Trust expenses should be allocated. However, the Trust instrument merely invests the Trustees with discretion to allocate expenses between income and principal, and states that this discretion must be exercised reasonably, without favoring one beneficiary over another; it does not contain any specific requirements that supersede the principles enumerated in Art. 7425b-36. *Cf. supra* note 12. The question presented by duPont III's claim regarding the allocation of litigation expenses is whether the Trustees exercised their discretion reasonably. In the absence of evidence of the settlor's intent regarding how this discretion should be exercised, we must rely on general principles of what constitutes a reasonable exercise of discretion, including the principles enumerated in Art. 7425b-36 of the Texas Trust Act, which we regard as dispositive of Texas's policy on this question.

No reason is shown that the Trustees' exercise of their discretion arbitrarily favored duPont IV or that the Trustees did not act reasonably and in good faith toward assuring to the successive beneficiaries the full enjoyment of their respective interests, by their determination that the litigation expenses caused by duPont III's belated and essentially meritless attack upon the Trust he had created should be charged to his income interest rather than to the principal, of which duPont IV was the principal beneficiary.

IV

Robert Benchley once remarked that "there are several ways in which to apportion the family income, all of them unsatisfactory."[15] DuPont III seems to have learned this lesson the hard way. Having made one disposition of his property to shield it from his former wife, he now seeks a different result. We agree with the district court that duPont III has not justified revoking or reforming the Trust, which by its terms is irrevocable. We also uphold the district court's findings that duPont III failed to show either that removal of the Trustee is warranted due to hostility, or that the litigation expenses of the Trustees should not have been paid by the Trust, and the district court's finding that the Trustees did not abuse their discretion by allocating the litigation expenses to the income rather than the principal of the Trust.

We also remand to the district court the question of whether Nemours Plantation and Harridge House were effectively transferred to the Trust. A fundamental aspect

15. We might add that when there is so much money to go around, many families might welcome the duPont's state of dissatisfaction.

of due process is the right to be heard. Rendering judgment based only on the evidence of one party offends a litigant's most precious constitutional rights. Here, the district court in effect denied the appellants an opportunity to present their evidence, by initially granting the appellants' motion to dismiss but later ruling against the appellants with regard to a substantial issue in the case. This violated Rule 41(b) and denied the appellants due process.

Finally, we order the district court, on remand, to determine appropriate guardian and attorney ad litem fees for duPont IV.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX C

28 U.S.C. § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

APPENDIX D

Federal Rule of Civil Procedure 41(b):

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX E

Federal Rule of Civil Procedure 46:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

APPENDIX F

Federal Rule of Evidence 103(a):

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

APPENDIX G

Texas Revised Civil Statutes, Article 7425b-26:

> This Act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen in all cases where an express trust has been created; except that in the establishment of the principal, provision may be made touching all matters covered by this Act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwist contrary to law, shall control notwithstanding this Act.